STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN RUSSELL FALCONE,

Defendant-Appellant.

UNPUBLISHED

No. 186364
Berrien Circuit Court
LC No. 94-001048-FH

Before: Hoekstra, P.J., and Murphy and Smolenski, JJ.

HOEKSTRA, P.J., (dissenting).

I respectfully dissent. I cannot agree with the majority's conclusions that sufficient evidence supported defendant's conviction of attempted fourth-degree criminal sexual conduct or that it was proper for the trial court to instruct the jury on the cognate lesser offense of attempted fourth-degree criminal sexual conduct at the request of the plaintiff and over defendant's objection.

While I agree with the majority that the evidence, when considered in a light most favorable to the plaintiff, would have been sufficient to support a conviction of the completed offense of fourth-degree criminal sexual conduct, I believe their conclusion that the evidence was also sufficient to support defendant's conviction of attempt to be erroneous and based upon an incorrect reading of *People v Jones*, 443 Mich 88; 504 NW2d 158 (1993).

In *Jones*, our Supreme Court reaffirmed that a conviction for attempted felonious assault could stand even where the evidence showed a completed crime. Our Supreme Court, quoting *United States v York*, 578 F2d 1036, 1039 (CA 5, 1978), cert den 439 US 1005 (1978), and *United States v Fleming*, 215 A2d 839, 840-841 (DC App, 1966), stated:

> To compel acquittal of an attempt because the completed offense was proved would result in the "anomalous situation of a defendant going free 'not because he was innocent, but for the very strange reason, that he was too guilty.'" Moreover, requiring the government to prove failure as an element of attempt would lead to the anomalous result that, if there were a reasonable doubt concerning whether or not a crime had been completed, a jury could find the defendant guilty of neither the offense nor of an attempt.

> Therefore, every court, not otherwise bound by statute, that has considered the matter in recent years has refused to require that a defendant be acquitted of an attempt because he was guilty of completing what he set out to do.

Presumably, it is upon this language that the majority relies.

This reasoning, when applied to the charges at issue here, is wholly inapplicable. First, evidence that is sufficient to show that a defendant completed a crime is not necessarily sufficient to show that a defendant attempted to complete the crime. An attempt offense, unlike a necessarily lesser included offense, is cognate with the crime charged, meaning that "the elements of an attempt are not duplicated in the completed offense." *Jones, supra* at 103 n 1; *People v Adams*, 416 Mich 53, 56; 330 NW2d 634 (1982). Therefore, in order to properly convict a defendant of attempt, the evidence must *independently* support such a conviction, without reference to whether the evidence supports a conviction for the crime charged. Here, no such independent evidence was presented and I would find defendant's conviction of attempted fourth-degree criminal sexual conduct to have been supported by insufficient evidence.[1]

Because no evidence supporting the offense of attempted fourth-degree criminal sexual conduct was presented at trial, I would likewise find that the trial court's decision to instruct the jury regarding this cognate lesser offense to have been improper.

A trial court must give a requested instruction on a cognate lesser included offense if there is evidence on the record that would support a conviction of that offense. *People v Pouncey*, 437 Mich 382, 387; 471 NW2d 346 (1991). Under the standard established by our Supreme Court, there must be more than a modicum of evidence; there must be sufficient evidence that the defendant could be convicted of the lesser offense. *Id.* Specifically, with respect to attempts, our Supreme Court has held that a request to instruct a jury that it may find the defendant guilty of the cognate offense of attempt must be granted only when there is evidence tending to establish the elements of the cognate offense of attempt. *Adams, supra* at 57.

The statute addressing criminal sexual conduct in the fourth-degree, MCL 750.520e; MSA 28.788(5) provides, in pertinent part, as follows:

> (1) A person is guilty of criminal sexual conduct in the fourth degree if he or she engages in sexual contact with another person and if any of the following circumstances exists:
>
> (a) Force or coercion is used to accomplish the sexual contact. Force or coercion includes but is not limited to any of the circumstances listed in section 520(b)(1)(f)(i) to (iv).

I have found no cases which have cleanly outlined the elements of attempted fourth-degree criminal sexual conduct. However, to prove the crime of attempt, generally, the prosecution must establish (1) that defendant had the specific intent to commit the completed crime and (2) that defendant

performed an overt act going beyond mere preparation toward committing the crime. *People v Stapf*, 155 Mich App 491, 494; 400 NW2d 656 (1986). Further, the completed crime of fourth-degree criminal sexual conduct requires proof that "defendant engaged in an act of sexual contact with the complainant by force," *People v Sorscher*, 151 Mich App 122, 133; 391 NW2d 365 (1986), while Michigan's general attempt statute, MCL 750.92; MSA 28.287, provides that a person is guilty of attempt to commit an offense if the person does "any act towards the commission of such offense, but . . . fail[s] in the perpetration, or [is] . . . intercepted or prevented in the execution of the same."

Accordingly, by reading the attempt statute and the supporting case law together, in order for an instruction regarding attempted fourth-degree criminal sexual conduct to have been proper, the prosecution must have presented evidence sufficient for the jury to find beyond a reasonable doubt that defendant had the specific intent to engage in an act of sexual contact with the complainant by force or coercion, but failed in the perpetration of the offense, or was intercepted or prevented from committing the offense, yet performed an overt act, going beyond mere preparation, toward committing the offense.

Upon this record, I do not find even a modicum of evidence to support the trial court's giving of the attempt instruction. In this case, the facts as testified to by the witnesses simply cannot be construed to support a theory that is consistent with defendant being guilty of the lesser cognate offense. Plaintiff, in their brief, argues that the jury could have believed some, but not all, of the complainant's testimony and, therefore, could have reasonably found that defendant only attempted to commit fourth-degree criminal sexual conduct. In particular, plaintiff contends that the jury could have believed that defendant pushed the complainant onto the couch, laid himself upon her, and *then let her up after she protested*, thereby committing the attempt offense (emphasis added). My review of the record, however, reveals that the emphasized portion of plaintiff's argument was never made part of the evidence, never argued to the jury, and never a theory of the prosecution's case. Nor do I find that it was established circumstantially or through reasonable inferences which arose from the evidence. *People v Truong*, 218 Mich App 325, 337; 553 NW2d 692 (1996).

I further find no evidentiary support for the giving of this instruction recited in the opinion of the majority. Although they correctly set forth each party's theory of the case, the prosecution's theory being that defendant engaged in touching which resulted in sexual contact and the defendant's theory being that no sexual contact occurred and the complainant was lying, the majority then goes on to conclude that evidence supporting the giving of the attempt instruction was brought out during the advancement of *defendant's* theory. I, however, am unpersuaded by this attempt to construe isolated statements made by the complainant on cross-examination that she may have been less than truthful with the law enforcement personnel to be evidence that sufficiently supports the giving of an attempt instruction. At most, these statements reflected upon the credibility of the victim regarding whether the sexual conduct took place, a determination that would have been supported defendant's theory of the case that the victim was lying about the entire incident. Other than impermissible speculation, there was no basis from which the jury could have convicted defendant of an attempt based upon the facts of this case.

The nub of this case came down to a credibility contest between the opposing sides' witnesses. Defendant sought to have the jury decide the credibility issue without possibility of compromise. On the facts of this case, he had that right. The instruction allowing the jury to consider the cognate lesser offense of attempt deprived him of that opportunity, and allowed the jury to compromise and convict on an offense not supported by the evidence. Consequently, I believe that defendant is entitled to have his conviction reversed.

/s/ Joel P. Hoekstra

[1] Furthermore, unlike *Jones*, which involved a bench trial where the findings of fact made by the trial court clearly could have supported a conviction of a completed felonious assault, the instant case involved a jury trial where a credibility contest between two conflicting witnesses represented the bulk of the evidence. As we do not know what determinations the jury made, I do not believe that we can simply conclude that "the evidence show[ed] a completed crime." *Jones, supra* at 103.